ID AEU 4/1

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

APR 1 1999

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Transmittal of "Guidance on Section 303 of the Clean Air Act"

FROM: Eric V. Schaeffer, Director
Office of Regulatory Enforcement (2241)

TO: Addressees

Attached is a guidance document developed by the Office of Regulatory Enforcement and the Air Enforcement Division that supersedes EPA's September 15, 1983, guidance entitled "*Initiation of Administrative and Civil Action under Section 303 of the Clean Air Act During Air Pollution Emergencies*." Section 303 of the Clean Air Act provides the Agency with an effective authority to abate conditions that present an imminent and substantial endangerment to public health, welfare, or the environment. The new guidance provides examples of such conditions and explains the scientific and legal prerequisites for taking action in accordance with the statute.

Advancements in the health and environmental sciences continue to influence our understanding of the threats posed by air pollution. We must stay abreast of these advancements and be ready to exercise §303 when necessary. Yet we must also be mindful of the potentially significant economic and other effects of a §303 action and ensure that the relief requested is commensurate with the endangerment presented. This is a challenging area for enforcement and I greatly appreciate the many thoughtful comments and suggestions from the Regions, OGC and other headquarters offices, and the Department of Justice during the development of this guidance.

On November 12, 1997, my office distributed a compendium of imminent and substantial endangerment guidance documents. Please insert the attached guidance at Tab 9. For further information and assistance, please contact Mr. Cary Secrest of the Air Enforcement Division at (202) 564-8661. Cary deserves our thanks for working so hard to guide this important document to a successful conclusion.

Addressees:

Regional Counsels, Regions I-X
Director, Region I Office of Environmental Stewardship
Director, Region II Division of Enforcement and Compliance Assurance
Director, Region III Air Protection Division
Director, Region IV Air, Pesticides, and Toxics Management Division
Director, Region V Air and Radiation Division
Director, Region VI Compliance Assurance and Enforcement Division
Director, Region VII Air, RCRA, and Toxics Division
Assistant Regional Administrator, Office of Enforcement, Compliance and Environmental Justice, Region VIII
Director, Region IX Air Division
Director, Region X Office of Air Quality
Director, Federal Facilities Enforcement Office
Director, Office of Air Quality Planning and Standards

cc: Gregory Foote, Office of General Counsel
Lois Schiffer, Department of Justice

GUIDANCE ON SECTION 303 OF THE CLEAN AIR ACT
April 1999

I. INTRODUCTION

Section 303 of the Clean Air Act (Act), 42 U.S.C. § 7603,[1/] authorizes the Administrator of the Environmental Protection Agency (EPA) to bring an action for injunctive relief to abate imminent and substantial endangerments to public health, welfare, or the environment caused by emissions of air pollutants.[2/] Section 303 allows EPA to initiate judicial action against, or issue an administrative order to, any person who is causing or contributing to the pollution to stop the emissions of the pollutants or to take other action as necessary. As discussed in this guidance, §303 is a "gap-filling" authority, providing a basis for injunctive relief for a wide range of endangerment scenarios, regardless of a pollution source's compliance or noncompliance with any provision of the Act. It also provides for injunctive relief when an air pollutant(s) is not otherwise regulated under the Act.

On September 15, 1983, EPA issued a guidance document entitled *Initiation of Administrative and Civil Action under Section 303 of the Clean Air Act During Air Pollution Emergencies*. EPA is issuing this updated guidance in light of the 1990 Amendments to the Act which modified §303, and to account for more recent case law under similar Federal

---

[1/] Section 303, as amended in 1990, and codified at 42 U.S.C. § 7603, reads as follows:

Notwithstanding any other provisions of this chapter, the Administrator, upon receipt of evidence that a pollution source or combination of sources (including moving sources) is presenting an imminent and substantial endangerment to public health or welfare, or the environment, may bring suit on behalf of the United States in the appropriate United States district court to immediately restrain any person causing or contributing to the alleged pollution to stop the emission of air pollutants causing or contributing to such pollution or to take such other action as may be necessary. If it is not practicable to assure prompt protection of public health or welfare or the environment by commencement of such a civil action, the Administrator may issue such orders as may be necessary to protect public health or welfare or the environment. Prior to taking any action under this section, the Administrator shall consult with appropriate State and local authorities and attempt to confirm the accuracy of the information on which the action proposed to be taken is based. Any order issued by the Administrator under this section shall be effective upon issuance and shall remain in effect for a period of not more than 60 days, unless the Administrator brings an action pursuant to the first sentence of this section before the expiration of that period. Whenever the Administrator brings an action within the 60-day period, such order shall remain in effect for an additional 14 days or for such longer period as may be authorized by the court in which such action is brought.

[2/] Section 302(g), Definitions, and codified at 42 U.S.C. §7602(g), reads as follows:

The term "air pollutant" means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term "air pollutant" is used.

environmental statutes which informs EPA's authority to act under §303.[3] This guidance supercedes the 1983 guidance. It is intended to be used by EPA as internal guidance only and does not establish any substantive or procedural rights. EPA reserves the right to act at variance with this guidance and to change it without public notice.

The 1990 Amendments expanded the scope under which EPA may act pursuant to §303 from "imminent and substantial endangerment to the health of persons" to "imminent and substantial endangerment to public health or welfare, or the environment." The Amendments also eliminated the requirement for state or local inaction as a prerequisite to EPA initiating action under §303, and lengthened the duration of administrative orders pursuant to §303 from 24 hours to 60 days. In so doing, Congress greatly increased the utility of §303. However, as of the date of this guidance, EPA has exercised its new authority against a specific source only three times.[4] As discussed below, EPA does not believe that Congress restricted EPA's authority to act under §303 to situations where people are injured or other serious air pollution hazards are manifest. Rather, Congress also intended for EPA to use the authority to address risks before they caused harm. This guidance will help EPA carry out its authority as intended under the Act.[5]

In addition to initiating actions under §303, EPA has taken other emergency actions under statutes that have similar provisions, such as §106 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) ["when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the

---

[3] Other statutes include "emergency power" provisions giving appropriate government officials the right to seek judicial relief, or to take other action to avert imminent and substantial threats to the environment or public health. In the case of United States v. Reilly Tar & Chemical Corp., 546 F. Supp. 1100 (D. Minn. 1982) suit was brought under RCRA Section 7003. The court considered the imminent hazard provisions of RCRA, Section 504 of the CWA, Section 106 of CERCLA, Section 303 of the CAA, and the SDWA and noted that the phrase "imminent and substantial endangerment" was intended to be treated similarly in each statute. EPA believes it is appropriate to interpret identical terms such as "imminent" and "endangerment" in a consistent manner.

[4] See In Re: Minerec Mining Chemicals, EPA Docket No. R9-94-34 (Clean Air Act Emergency Order, August 26, 1994), and In Re: Minerec Mining Chemicals, EPA Docket No. R9-94-34 (First Amended Clean Air Act Emergency Order, September 28, 1994); In Re: Shallow Water Refinery , EPA Docket No. VII-97-CAA-120 (June 12, 1997); and In Re: Trinity America Corporation, EPA Region IV, October 3, 1997. Prior to 1990, EPA used its §303 authority to address high particulate matter in North Birmingham, Alabama (1971), and to address an asbestos hazard at a mine in Globe, Arizona (1983).

[5] The Amendments also contain a provision similar to §303 under §112(r)(9), which pertains to accidental releases of a regulated substance as defined by §112(r)(3). The reader is encouraged to read EPA's guidance concerning the use of this section, published by EPA in an April 17, 1991 document entitled *Guidance on Using Order Authority under Section 112(r)(9) of the Clean Air Act, as Amended, and on Coordinated Use with Other Order and Enforcement Authorities*, and in Fed Reg. Vol. 56, No. 104, p. 24394, May 30, 1991.

environment"] and §7003 of the Resource Conservation and Recovery Act (RCRA) ["may present an imminent and substantial endangerment to health or the environment"]. This guidance is consistent with the case law and administrative practice under these other authorities, and the Amendments of 1990.[6] It is also consistent with other published guidelines for taking action under EPA's imminent and substantial endangerment authority.[7]

II. LEGAL PREREQUISITES TO INITIATING ACTION UNDER SECTION 303

The basic prerequisites to initiating action against a party under §303 are that the Administrator has received evidence that: (1) a pollution source or combination of sources (including moving sources) is presenting an imminent and substantial endangerment to public health or welfare, or the environment; and (2) the party to be restrained is causing or contributing to such alleged pollution. In addition, §303 requires the Administrator, prior to taking any action, to consult with appropriate State and local authorities and attempt to confirm the accuracy of the information on which the action proposed to be taken is based. The following discussion includes the definitions of key terms, the legislative history and case law, and the resources available to assist EPA staff as they address these prerequisites.

A. Evidence Indicates that a Pollution Source or Combination of Sources (Including Moving Sources) is Presenting an Imminent and Substantial Endangerment to Public Health or Welfare, or the Environment

1. The meaning of "imminent and substantial endangerment"

a. "Endangerment"

EPA interprets "endangerment" under §303 to mean threatened or potential harm, as well as actual harm. Therefore, EPA need not delay taking action under §303 until actual harm

---

[6] The legislative history of the 1990 Clean Air Act Amendments indicates that one reason for amending §303 was to make it similar to other endangerment authorities. The Senate Report on the 1990 Amendments states in relevant part:

> These changes are necessary to enable the Administrator to address air pollution emergencies in an adequate manner, and to conform the Administrator's emergency authority under the Act to emergency authorities under other environmental laws. See, TSCA section 208, CERCLA section 106, RCRA section 7003, and CWA section 504. Similarly, the deletion of the requirement that the Administrator may not bring suit unless State or local authorities have failed to act conforms the Act to other environmental laws. [S. Rep. No. 101-228, 101st Cong., 1st Sess. 370 (1989)]

As discussed herein, key provisions of these authorities are similar. There should be no practical differences in the scope of EPA's authority between these similarly-worded statutes.

[7] See 47 FR 20664, May 13, 1992; 56 FR 24393, May 30, 1991, and 59 FR 58970-71, November 15, 1994.

occurs. Such delay would thwart Congress' intent that EPA use §303 to protect the nation's air quality. As stated in the House Report on the Clean Air Act Amendments of 1977:

> In retaining the words "imminent and substantial endangerment...," the committee intends that the authority of this section not be used where the risk of harm is completely speculative in nature or where the harm threatened is insubstantial. However, ... the committee intends that this language be constructed by the courts and the Administrator so as to give paramount importance to the objective of protection of the public health. Administrative and judicial implementation of this authority must occur early enough to prevent the potential hazard from materializing (emphasis added). [8/]

The Senate Report on the 1990 Amendments to §303, which expanded the application of §303 to public welfare and the environment, expressly states that §303 applies to "threatened" harm. The Report says:

> These amendments to section 303 of the Act, as well as parellel (sic) amendments to section 113, have several purposes. the (sic) amendments broaden the Administratror's (sic) authority to issue emergency orders to abate threats to welfare and the environment, in addition to the authority to respond to threats to "the health of persons."
>
> Broadening section 301 (sic) to include harm to the environment is important to enable EPA to address emergency threats to ecosystems in instances where there is no readily demonstrable immediate threat to human health. For example, toxic emissions might be blowing downwind from a facility into an undeveloped natural area and threatening to impair that area's ecosystem. This amendment will allow EPA to order the plant to take necessary steps to eliminate the threat to flora and fauna (emphasis added).[9/]

Courts have interpreted "endangerment" to include threatened or potential harm under §211 of the Act (providing EPA the authority to regulate fuels) and other environmental statutes.[10/] In Ethyl Corporation v. Environmental Protection Agency,[11/] the Court interpreted the "endanger" standard under §211 as requiring only a finding that lead emissions presented a "significant risk" of injury to the public. In Ethyl, the question was whether EPA was justified in

---

[8/] H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 328 (1977).

[9/] S. Rep. No. 101-228, 101st Cong., 1st Sess. at 370 (1989).

[10/] See discussion of endangerment in, e.g., Dague v. City of Burlington, 935 F.2d 1343, 1356 (2d Cir. 1991) (RCRA § 7002); United States v. Conservation Chemical Co., 619 F. Supp. 162, 192 (W.D. Mo. 1985) (CERCLA § 106).

[11/] 541 F.2d 1 (D.C. Cir. 1976).

requiring the reduction of lead in gasoline when there was no finding of the presence of actual harm from exposure to airborne lead. The Court said:

> When one is endangered, harm is threatened; no actual injury need ever occur....A statute allowing for regulation in the face of danger is, necessarily, a precautionary statute. Regulatory action may be taken before the threatened harm occurs; indeed, the very existence of such precautionary legislation would seem to demand that regulatory action precede, and, optimally, prevent, the perceived threat (emphasis added).[12]

In Reserve Mining Co v. Environmental Protection Agency,[13] the court similarly interpreted the term "endangering" under §1160(g)(1) of the Federal Water Pollution Control Act[14] in a case involving asbestos discharges into Lake Superior. The Court stated that "Congress used the term 'endangering' in a precautionary or preventive sense, and, therefore, evidence of potential harm as well as actual harm comes within the purview of that term."[15] In Reserve, relief was based on "an acceptable but unproved medical theory" that ingestion of asbestos fibers might cause cancer.[16] The Court in Reserve, however, indicated that the term "endangering" under §1160(g)(1) connotes a "lesser risk of harm" than the phrase "imminent and substantial endangerment."[17] EPA, therefore, should determine that the threatened or potential harm is "imminent" and "substantial" before initiating action under §303.

b. "Imminent"

EPA believes that an endangerment is "imminent" under §303 where present conditions indicate a threat of harm to the public health, welfare or the environment, no matter how distant the manifestation of actual harm may be, as well as where conditions indicate an immediate threat of harm. As the 1970 Senate Report on §303 states:

> The levels of concentration of air pollution agents or combination of agents which substantially endanger health are levels which should never be reached in any community. When the prediction can reasonably be made that such elevated levels could be reached even for a short period of time--that is that

---

[12] Ethyl, 541 F.2d at 13 (D.C. Cir. 1976).

[13] 514 F.2d at 492 (8th Cir. 1975).

[14] The 1972 amendments to the Federal Water Pollution Control Act, known as the Clean Water Act, added §504, the present imminent and substantial endangerment standard for water pollution control.

[15] Reserve, 514 F2d at 528 (8th Cir. 1975)..

[16] Id., at 529.

[17] Id., at 528.

> they are imminent--an emergency action plan should be implemented... (emphasis added).[18]

Courts have interpreted the term "imminent" under other environmental statutes to include situations where present conditions indicate there may be a risk to health or the environment,[19] even though the harm may not be realized for years.[20] It is not necessary for the endangerment to be immediate or tantamount to an "emergency" to be imminent and warrant relief.[21] The Court in Dague v. City of Burlington, for example, found an imminent endangerment in a RCRA case involving a municipal landfill that was leaking approximately 10% of its leachate containing low levels of lead into an adjacent cattail marsh. Lead in test wells surrounding the landfill was generally below the maximum contaminant level for drinking water, and no actual harm was shown to the marsh. There was evidence, however, that the leachate from the landfill was toxic to freshwater aquatic life, including at least one vertebrate in the food chain, and an expert testified that, in a system such as the cattail marsh where there is a high tolerance for toxic chemicals, signs of stress may appear only after a latent stage of deterioration.[22] The Court concluded that there was an imminent endangerment to the cattail marsh even though the harm would not become apparent until some time in the future.

Thus, it is the risk of harm that must be "imminent." The actual harm itself may not eventuate or be fully manifest for a period of many years, if at all.[23] Moreover, even where the conditions giving rise to the risk have been present for some time, EPA is not precluded from addressing them as an imminent endangerment.[24] Contaminants that lead to chronic health effects, as well as acute health effects, may be considered to cause imminent endangerment.[25]

---

[18] S. Rep. No. 91-1196, 91st Cong., 2d Sess. 36 (1970).

[19] See, e.g., Dague, 935 F.2d at 1356.

[20] See, e.g., United States v. Valentine, 856 F. Supp. 621, 626 (D. Wyo. 1994); Conservation Chemical, 619 F. Supp. at 194.

[21] See, e.g., Valentine, 856 F. Supp. at 626 (citing United States v Waste Industries, Inc., 734 F.2d 159 (4th Cir. 1984); but see, Outboard Marine Corporation v. Thomas, 773 F.2d 883 (7th Cir. 1985) ("This grant of power [under CERCLA § 106], however, applies only in emergency situations.")

[22] Dague v. City of Burlington, 732 F. Supp. 458, 463-64; 468-69 (D. Vt. 1989).

[23] See, e.g., Conservation Chemical, 619 F. Supp. at 193-194.

[24] See In Re FCX, Inc., 96 B.R. 49, 55 (Bkrtcy., E.D.N.C. 1989), interpreting CERCLA §106 ("even when there is an inordinate delay [by EPA], the court must find an immediate danger to public health if in fact one exists").

[25] Conservation Chemical, 619 F. Supp. at 194.

EPA, therefore, may properly take action to abate air emissions under §303 even though the harm itself may not be immediate, and the amount of time for harm from such emissions to become apparent is uncertain. This permits the Agency, for example, to act to seek abatement of emissions reasonably believed to be carcinogenic, even though it is uncertain how long it would take for the emissions to result in actual harm to individuals.

c. "Substantial"

Courts have found an endangerment to be "substantial" under other environmental statutes where there is a reasonable cause for concern that health or the environment is at risk.[26] It is not necessary to quantify the endangerment for it to be considered substantial. For example, proof that a certain number of people will be exposed or that a certain number of deaths will occur is not required.[27] A number of factors, such as the quantities of the hazardous substances involved, the nature and degree of their hazards, or the potential for human or environmental exposure, may be considered in determining whether there is a reasonable cause for concern. In any given case, one or two factors may be so predominant as to be determinative of the issue.[28] For example, the Court in United States v. Conservation Chemical Co. found a "substantial" endangerment under CERCLA §106, where numerous hazardous substances from chemical wastes were present and being released into the environment from a site, and there was a risk that humans or wildlife might venture onto the site and come into contact with the substances.[29] The Court in United States v. Vertac Chemical Corporation found the chemical dioxin to be presenting a "reasonable medical concern over public health," and thereby to be constituting an imminent and substantial endangerment to health under RCRA §7003, where the chemical was widely believed, but not fully proven, to be hazardous.[30] EPA interprets these decisions to mean that an endangerment is "substantial" under §303 where there is a reasonable cause for concern for public health, welfare or the environment if remedial action is not taken.

Thus, §303 provides authority to address threats to public health, welfare or the environment in a variety of circumstances, and is not limited to situations involving pollution concentrations associated with "emergency" levels or severe effects.[31] Section 303 should not be used where the risk of harm is completely speculative or where the threatened harm is

---

[26] See, e.g., Conservation Chemical Co., 619 F. Supp. at 194.

[27] Id.

[28] Id. at 194-195.

[29] Id., at 195.

[30] 489 F. Supp. 870, 885 (E.D. Ark. 1980).

[31] See 59 FR 58958, 58970 (November 15, 1994) discussing the authority to use §303 to address situations where health-based, ambient air target or trigger levels are exceeded.

insubstantial.[32] If, however, the Agency can show that the suspect emissions are creating a non-speculative "reasonable concern" that public health, welfare or the environment is at risk of harm, action under §303 is appropriate.

d. "Is presenting"

The prefatory language in §303 differs from that of RCRA §7003 and CERCLA §106. While §303 provides that EPA may act when a pollution source or combination of sources "is presenting" an imminent and substantial endangerment, RCRA §7003 and CERCLA §106 authorize EPA to act when conditions "may present,"or "there may be,"respectively, an imminent and substantial endangerment. In Dague and other decisions, the phrase "may present" has been interpreted as "expansive language" indicating the Congressional intent "to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate *any risk* posed by toxic wastes."[33] Given the legislative history of this provision, as discussed earlier, it appears that Congress did not intend to create less protection for the public or the environment than under other environmental statutes, and therefore may not have intended any difference in meaning from the slight difference in text. At worst, one could argue that the difference in language may mean that the emissions that would pose the threat be either ongoing or reasonably predicted, as distinct from theoretically potential emissions. EPA does not believe that this difference in prefatory language or the judicial interpretation of "may present" undermines the application to §303 of established case law interpreting the phrase "imminent and substantial endangerment" under other statutes.

In either event, the "is presenting" requirement is clearly met when there are ongoing emissions that endanger public health, welfare, or the environment. The "is presenting" requirement can also be satisfied when the source is intermittent. For example, a source might operate a process that periodically emits a highly toxic air pollutant. It is not necessary for EPA to wait for the emissions to occur before issuing a §303 order to abate the endangerment. An endangerment can be present even if it is not on a continuous basis.

2. The meaning of "public health or welfare, or the environment"

As discussed above, the 1990 Amendments expanded the standard under §303 from "imminent and substantial endangerment to the health of persons" to "imminent and substantial endangerment to public health or welfare, or the environment." The use of the word "or" indicates that an endangerment to either public health, welfare, or the environment alone, will warrant relief under §303.[34]

---

[32] See H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 328 (1977).

[33] Dague v. City of Burlington, 935 F.2d at 1355 (citing United States v. Price, 688 F.2d 204, 2113 (3rd Cir. 1982).

[34] Conservation Chemical, 619 F. Supp. at 192.

The Senate Report on the 1990 Amendments states that broadening §303 to apply to harm to the environment "is important to enable EPA to address emergency threats to ecosystems in instances where there is no readily demonstrable immediate threat to human health."[35] The Report further states that, for example, where a facility is emitting pollutants that are threatening to impair an area's ecosystem, §303 will allow EPA to order the facility "to take necessary steps to eliminate the threat to flora and fauna." Congress, therefore, clearly intended the word "environment" to include plant and animal life and ecosystems generally, in the absence of threatened harm to human health. Additionally, case law under RCRA defines "environment" to encompass the air, soil and water, including groundwater.[36]

The Senate Report does not address the expansion of §303 to welfare. The term "welfare" is defined in the Act, however. Section 302(h) states:

> All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being, whether caused by transformation, conversion or combination with other air pollutants.

This statutory definition of "welfare" is broader than, and encompasses the elements of, "environment"as defined above. The court in Conservation Chemical also found under CERCLA that "[t]he term 'public welfare' is exceptionally broad, and encompasses 'health and safety, recreational, aesthetic, environmental and economic interests."[37] The court stated further that "[t]he expansive scope of the terms 'public welfare' and 'environment' mandates the conclusion that Congress intended injunctive relief to issue whenever any aspect of the nation's interest in a clean environment may be endangered imminently and substantially by a release."[38] EPA's authority under §303, therefore, may be used to abate imminent and substantial endangerments affecting a broad spectrum of concerns.

B. Any Person Causing or Contributing to the Alleged Pollution

1. The meaning of "any person"

Section 303 provides that the Administrator may take action to restrain "any person" causing or contributing to pollution from a source or combination of sources that is presenting an imminent and substantial endangerment to public health or welfare, or the environment. Section

---

[35] S. Rep. No. 101-228, 101st Cong., 1st Sess. 370 (1989).

[36] Lincoln Properties, 23 Envtl. L. Rep. at 20671-72.

[37] Conservation Chemical, 619 F. Supp. at 192.

[38] Id.

302(e) of the Act defines "person" to include "an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof." Thus, any entity specified in §302(e) that is causing or contributing to the alleged pollution may be subject to §303. Such a person could include, for example, corporate officers, the individuals who own or operate a polluting source, the lease holders or contractors of same, or the corporate entity itself. As discussed in the following section, this could also include past owners of a facility who caused or contributed to a present endangerment.[39/]

2. The meaning of "causing or contributing to" the alleged pollution

Section 303 may apply whenever there is evidence that "a pollution source or combination of sources" is presenting an imminent and substantial endangerment, and EPA may bring action to restrain "any person *causing or contributing to* the alleged pollution to stop the emission of air pollutants causing or contributing to such pollution" (emphasis added).

Causation, in the air pollution context, is rooted in common law. In past decisions, the courts have recognized that air pollutants can be distributed over a large geographical area and pollution injuries may be the result of cumulative effects of several emissions from different sources.[40/] This can sometimes make it difficult for a plaintiff to prove that a particular defendant was the source of the pollution that caused the injury. In a typical common law negligence action, the plaintiff must show that it was an action or inaction of the defendant which caused the injury. This is causation-in-fact. However, the courts have recognized that it is often difficult to show causation-in-fact in tort cases involving toxic agents and have relaxed the requirement that the plaintiff must show cause in fact. Courts will usually find a defendant liable if defendant's conduct was a substantial factor in causing the alleged endangerment. Plaintiffs are also aided by the theory of joint and several liability which has been applied to independent discharges of air pollutants where the effects of each plant's pollution was impossible to determine.[41/] EPA believes that the Agency may proceed with a §303 action when the person's conduct is a substantial factor in causing the alleged harm.

EPA may take action against any person who is *contributing* to the emissions of the air pollutants creating an endangerment, regardless of the extent of that person's overall contribution to the problem. For example, on November 18, 1971, the District Court for the Northern District of Alabama issued a temporary restraining order under §303 curtailing operations at 27 steel-

---

[39/] EPA notes that in practice, §303 orders are usually issued to organizations, not individuals.

[40/] Reitze, Arnold, *Overview and critique : a century of air pollution control law: what's worked; what's failed; what might work.* 21 Envtl. Law 1549 (1991).

[41/] Michie v. Great Lakes Steel, 495 F.2d 213 (6th Cir.), cert. denied, 419 U.S. 997 (1974).

making facilities near Birmingham, Alabama.[42] The average particulate matter levels in the preceding 48 hours was found to be 725 micrograms per cubic meter, levels which were considered harmful to human health. EPA's complaint did not allege the specific contribution of each facility to the overall particulate matter levels. It simply stated that "the Administrator of the Environmental Protection Agency has received evidence that *a combination of pollution sources, including the defendant's plants,* are presenting an imminent and substantial endangerment to the health of persons by discharging particulate matter into the air" [emphasis added].

EPA interprets the phrase "contributing to" under §303 to mean, as it was exercised in the above-referenced action and as judicially interpreted under RCRA, "to have a share in any act or effect."[43] It is not necessary for the person to be directly controlling the activities that are creating an imminent and substantial endangerment to issue an order or take other action under §303.[44] Nor is it necessary that a person be responsible for a specific share of the effect. A combination of air pollution sources may present imminent and substantial endangerment even though the emissions from a single source, if considered alone, may be of lesser concern. In some cases, it may be necessary to address an individual source under §303 even though the action would not completely eliminate the pollutant(s) of concern.

It may also not be necessary for the person to own the polluting source. The United States sought an injunction against the owners of a site under CERCLA §106, RCRA §7003, and CAA §303 to address endangerment from asbestos contamination. The defendants owned or operated an asbestos mill at the site until 1974. Prior to closing the mill, the owners used asbestos-containing mill tailings to grade the property for mobile home plots, and offered the lots for sale in 1973. Fifty lots were sold at a site of some 17 acres. The Court found that, under §303, the residential subdivision and a second, nearby mill that was still in operation were "pollution sources or a combination of sources" and that the past owners of the site "caused or are contributing to such pollution." The Court ordered the defendants, who included individuals and corporations that formerly owned the subdivided site, to abate the releases and threatened releases of asbestos in the area.[45]

---

[42] United States v. U.S. Steel, No. 71-104 (N.D.Al, Nov. 18, 1971). Meteorological conditions improved on November 19, 1971, and the order was vacated.

[43] United States v. Aceto Agricultural Chemical Corp., 872 F.2d 1373, 1384 (8th Cir. 1989). Also, see Zands v. Nelson, 779 F. Supp. 1254, 1264 (S.D. Cal. 1991) (The Court held that a person who operated equipment during the time that solid waste leaked from that equipment to be a "contributor").

[44] Id., at 1383 (The Court held that a person contributed to the handling and disposal of pesticide-related wastes because that person had (1) contracted with a company that formulates commercial grade pesticides through a process that inherently involves the generation of wastes, and (2) maintained ownership of those pesticides throughout the process).

[45] U.S. v. Metate Asbestos Corp., 584 F Supp. 1143 (D.C. Az. 1984).

Thus, EPA believes that under §303, that the Agency may take action to restrain any person(s) whose actions (or inactions) are responsible for creating emissions of air pollutants which are presenting the endangerment. This action may be taken even if such person(s) no longer own the pollution source.

C. The Administrator shall consult with appropriate State and local authorities and attempt to confirm the accuracy of the information on which the action proposed to be taken is based

Section 303 requires EPA to consult with the State and local authorities before taking any action under that section and attempt to confirm the accuracy of the information on which the action proposed to be taken is based. The legislative history states that this consultation is required "to protect State interests and to prevent duplication of effort."[46]

Prior to 1990, one of the prerequisites for taking action under §303 was that "the appropriate State or local authorities have not acted to abate such sources" (§303, as amended in 1977 and codified in 42 U.S.C. 7603). In removing this prerequisite from §303, Congress removed a requirement that had the potential to delay Federal action.[47] However, the present consultation requirement should not be viewed as an obstacle to effective action by EPA. It is not a concurrence requirement, but rather one of notification and corroboration prior to taking action. In consulting with the appropriate State or local authority, EPA should determine whether the information upon which EPA intends to act is accurate. In assessing the scope of action to be taken under §303, EPA may take into consideration any action taken by State or local authorities. However, the existence of state or local action does not bar EPA from proceeding under §303.

III. WHEN AND HOW TO APPLY SECTION 303

A. General Applicability

Action under §303 is appropriate when there is a reasonable cause for concern that public health, welfare, or the environment is endangered. The degree of endangerment or actual harm warranting action under §303 is a fact-specific evaluation that may be based on witness statements, medical reports, expert opinion, or other evidence. However, in no case is a formal risk assessment required. As discussed above, §303 is a precautionary authority, intended to be used without delay "upon receipt of evidence" that an endangerment exists. The courts have

---

[46] S. Rep. No. 101-228, 101st Congress, 1st Sess., at 370.

[47] For further discussion on the effect of this pre-1990 provision, see pages 5, 6, and 7 of the EPA guidance document entitled *Initiation of Administrative and Civil Action Under Section 303 of the Clean Air Act During Air Pollution Emergencies*, September 15, 1983.

recognized that scientific proof of an endangerment does not always exist and have ruled in favor of the Agency when evidence created a sufficient inference of substantial risk or actual harm.[48/]

EPA may rely on scientific studies, expert opinion, the conclusions drawn during the promulgation of National Ambient Air Quality Standards and other rules, the findings of other governmental agencies such as the Agency for Toxic Substances and Disease Registry (ATSDR) or state environmental or public health agencies and other credible evidence.[49/] For example, if ATSDR issues a health consultation describing a public health threat posed by a particular facility, the issuance of that document is sufficient for a §303 action. EPA should also utilize witness statements such as affidavits from former or current employees or residents if the pollution source is located near a residential area. Statements from credible witnesses that can be corroborated by ambient measurements or other information could provide a sufficient basis for the issuance of the §303 order.

Section 303 applies to a broad range of endangerment scenarios. It applies regardless of whether a pollutant is regulated, or how it is regulated.[50/] For example, endangerment from a power plant's emissions of sulfur dioxide could be addressed, even if the plant is in compliance with its regulatory emissions limits, or a hazardous air pollutant could be addressed, even if there are no applicable regulations controlling the emissions. Section 303 can also apply to mixtures of pollutants, even if a specific individual pollutant cannot be clearly associated with a potential or observed effect.[51/] For example, emissions of hydrogen sulfide, a gas that does not normally affect individuals with asthma, can oxidize into sulfur dioxide which aggravates the disease even at relatively low concentrations. Section 303 may also be used in combination with §114 to require information from a source when, for example, the Agency is unable to characterize the type and level of pollutants, or engineering information is needed to consider the appropriate injunctive relief.

[48/] In United States v. Vertac, 489 F. Supp., 870, (E.D. AR, 1980), the court ruled that the public was endangered by the release of dioxin, which at the time was considered toxic under acceptable but unproven medical theory. In Valentine, the court ruled that scientific proof of harm was not required, rejecting an argument that EPA's failure to perform post-mortem analyses on each dead animal found at the site precluded inference as to the cause of death.

[49/] EPA discussed the possibility of establishing ambient thresholds that, if exceeded, would clearly trigger the ability to use §303 authority. See, e.g., 59 FR 58958 (November 1994), 60 FR 12492 (March 7, 1995), and 62 FR 210 (January 2, 1997). This would merely establish clearly-recognized thresholds, and would not preclude the use of §303 for lower ambient pollutant levels.

[50/] An administrative order or civil action may be taken "notwithstanding any other provision" of the Act. CAA Section 303.

[51/] Section 303 applies to emissions of "air pollutants," which is defined in §302 as "...any air pollution agent or combination of such agents...[including]...any precursors to the formation of any air pollutant."

In addition to public health and environmental harm, it should be stressed that the section can also be used when there is an endangerment to the *public welfare*. As discussed above, the Act defines welfare broadly.

Action under §303 may also be taken notwithstanding the length of time an endangerment has persisted. For example, action may be taken to address unacceptable emissions from a facility, even if that facility has been in operation for decades. A case in point is EPA's 1971 action to address particulate matter pollution from 27 steel mills in Alabama. The steel mills had been in operation for many years before action was taken. It was EPA's *receipt of evidence* (§303), i.e., the particulate matter data, that provided a reasonable cause for concern and allowed EPA to initiate the action. Conversely, EPA may also take action after harm has occurred to prevent a future recurrence. For example, EPA's action against Minerec Mining Company occurred after releases of hydrogen sulfide had sent people to the hospital. The action was a precautionary measure, intended to prevent further harm.

Taken as a whole, EPA may use its authority under §303 to address a broad spectrum of non-speculative adverse impacts, or diverse combinations of impacts, of air pollution. EPA may consider one or more of the following general factors (this list is not exhaustive):

- Toxicity and concentration of pollutant(s).
- Effects of mixtures of pollutants.
- Exposure pathway.
- Population sensitivity.
- Potential for acute exposure.
- Potential for chronic exposure.
- Prevailing meteorological conditions and effect on potential exposure.
- Likelihood of endangerment, even if effects are not observed.
- Bioaccumulation of pollutant.
- Visual signs of stress on vegetation.
- Sensitivity of birds, fish, and wildlife to pollutant.
- Effects on the public welfare, such as visibility impairment, crop damage, accumulation of toxic metals in soil, loss of fishery resource from a toxic pollutant, deterioration of property values, corrosion of structures, etc..

Examples of imminent and substantial endangerments under §303 could include, but are not limited to:

- A carcinogenic air pollutant from an industrial facility is found at concentrations of concern for chronic human exposure.
- Sulfur dioxide emissions from a source or combination of sources that could, under certain meteorological conditions common to the area, aggravate asthma in sensitive populations.
- A toxic metal is emitted to the air, threatening the flora and fauna of a nearby natural area.
- Pollution from a source results in damage to and deterioration of property.

- o Insecticide spray often drifts into a nearby residential area.
- o A facility that is exempt from state implementation plan requirements emits high concentrations of particulate matter.
- o Pollution from a "grand-fathered" oil refinery adversely affects down-wind residential areas.

Other authorities under the Act could also be applied in the above situations. The decision to use §303 should be based primarily on whether such other authorities will address an imminent and substantial endangerment in a timely manner.[52/] Section 303 may also be necessary when there are practical impediments to the use of other authorities in specific situations. For example, §303 may be appropriate when a revision to a State Implementation Plan would take too long to address an endangerment, or emissions of HAPs present an endangerment even though the facility is in compliance with emissions requirements. Section 303 may also be appropriate when there are no regulatory requirements that are currently applicable to a particular source. The following discussion addresses some of these considerations.

B. Criteria Air Pollutants

Section 109 of the Clean Air Act directs EPA to promulgate regulations setting National Ambient Air Quality Standards (NAAQS) for six criteria air pollutants. These standards are intended to protect public health [the primary standards], and public welfare [the secondary standards]. EPA periodically reviews the effects of criteria air pollutants and may from time to time promulgate revised standards. Such revisions undergo notice and comment rulemaking. The final Federal Register notice is EPA's formal position on the effects of the relevant criteria pollutant. In addition to the notice, there may be information in the rulemaking docket which may be relevant to a specific situation.

In addition, Subpart H and Appendix L of the State Implementation Plan regulations at 40 CFR Part 51 outline a phased emissions reduction program for air pollution "emergencies" involving criteria pollutants and the health of persons. This "emergency episodes program" was designed to supplement the NAAQS by providing additional protection in situations not effectively addressed by them. The episode criteria and associated abatement actions are preventative measures designed to ensure that certain pollution concentrations -- "significant harm levels" -- never occur. Specific action levels are prescribed for sulfur dioxide, particulate matter, carbon monoxide, ozone, and nitrogen dioxide. In increasing degrees of seriousness, the levels are "alert," "warning," and "emergency." The "warning" and "alert" levels are designed to ameliorate situations before the emergency state by application of moderate controls. The

---

[52/] The House Report on §108(k) of the Air Quality Act of 1967, the predecessor of §303, states that the provision "is not intended as a substitute procedure for chronic or generally recurring pollution problems, which should be dealt with under the other provisions of the act." H.R. Rep. No. 728, 90th Cong., 1st Sess. 119 (1967). In Reilly Tar & Chemical, the court noted that while Congress did not intent for EPA to use emergency powers authorities as a substitute for other statutory authorities, the "broad range of response authorities provided by Congress ....suggests that it intended to provide EPA flexibility..." in choosing the appropriate statutory response.

emergency levels are those at which "significant harm to health" is expected to occur if action is not taken to prevent air quality from deteriorating further. While the "emergency" level can be clearly construed to present an imminent and substantial risk to public health, abatement measures may be required at lower levels to prevent air quality from deteriorating further, or to avoid less serious health effects that can occur at those levels. Moreover, the emergency episodes program might not provide an effective response for sensitive populations, such as children, the elderly, or people with asthma.[53/] Also, these levels are not intended to protect public welfare or the environment. Flexibility is essential and appropriate action should be taken pursuant to §303 whenever necessary to prevent the significant harm levels from being reached.

C. Hazardous Air Pollutants

Section 112 of the Act requires EPA to establish regulatory standards for emissions from stationary sources that emit one or more of the hazardous air pollutants (HAPs) listed in the Act. The EPA Office of Air Quality Planning and Standards (OAQPS) promulgates technology-based (as opposed to risk-based) "maximum achievable control technology" (MACT) standards and "generally available control technology" (GACT) standards governing HAPs under §112(d). In addition, Congress provided for a means of future oversight to ensure that the desired protection from hazardous air pollutants was indeed occurring. Under §112 (f), Congress required EPA to promulgate more stringent risk-based standards within 8 years after promulgation of MACT standards if promulgation of such standards is necessary to provide an ample margin of safety to protect public health, or to prevent an adverse environmental effect.

OAQPS develops methodologies and procedures for determining residual risks to health and the environment. However, since this process might not lead to additional risk-based standards until 8 years after promulgation of a MACT standard, an imminent and substantial endangerment could arise even if a facility was in compliance with the current MACT or GACT standards. Section 303 would be an appropriate authority for addressing such risks.

In addition to the MACT standards, there are also efforts to address HAPs for specific objectives, such as the Urban Area Source Program and the Great Waters Program. As of this writing, there is a comprehensive effort underway to assess the risks posed by HAPs to urban populations. OAQPS should be consulted about the risk posed by HAPs and to determine the status of MACT, GACT, or risk-based standards before a §303 action is undertaken.

It should be noted that the criteria pollutants and HAPs listed in the Act or EPA regulations are not the only air pollutants for which action under §303 may be appropriate. As noted above, §302 defines "air pollutant" broadly. For example, a chemical that is used as a pesticide may also be an air pollutant, and a circumstance could arise where the pollutant presents an imminent and substantial endangerment. There may also be chemicals emanating from industrial or other sources that are not listed under §112 which pose a cause for concern.

[53/] On January 2, 1997, EPA published a proposed "intervention level program" under the authority of §303 to address high 5-minute sulfur dioxide peak levels in certain areas of the country. The intent is to provide protection in addition to the ambient standards for asthmatic individuals [62 FR 210 - 222].

Under Congressional mandate, ATSDR produces Toxicological Profiles for a large number of pollutants, including HAPs. Draft profiles undergo public comment and review before final profiles are issued. The profiles typically include a comprehensive analysis of the health effects from inhalation, oral intake, and dermal exposure; the mechanisms of action; interactions with other chemicals; identity of susceptible populations; adequacy of the data, and other information that may be pertinent to action under §303. Toxicological profiles are available from the National Technical Information Service (contact: 800-552-6847).

The Occupational Safety Health Administration (OSHA) establishes standards for exposure to air pollutants inside the workplace. Although not directly related to ambient air, these standards provide one point for assessing the risk to the public when such pollutants, e.g., various organics, become airborne in a community. Computerized health effects data bases, such as Toxline and Chemline, may also be useful. These data bases are run by the National Library of Medicine and may be accessed through the EPA Headquarters or regional office libraries.

IV. RELIEF AVAILABLE UNDER SECTION 303

Section 303 authorizes EPA to "bring suit in the appropriate district court" to seek certain relief. It also authorizes the Agency to issue administrative orders in the event that "it is not practicable to assure prompt protection...by commencement of such civil action... ." If the circumstances at a site require immediate action, an administrative order can be issued as soon as EPA has evidence satisfying the statutory criteria. However, under §303, these orders "remain in effect for a period of not more than 60 days" unless EPA brings suit in district court prior to the expiration of an administrative order, after which time the order remains in effect for an additional 14 days or longer as may be authorized by the court. EPA coordinates closely with the U.S. Department of Justice when issuing administrative orders. Such coordination ensures that judicial action can follow in a timely manner if injunctive relief is required for more than 60 days.

The scope and nature of an investigation should be governed by the specific facts of the matter and the underlying policy for the inclusion of §303 authority, that is, protection of the public or the environment before any harm can occur. EPA presumes that, in reviewing a decision to act, the courts will consider whether the agency acted rationally given the facts available to it, and that the action was proportional to the endangerment presented. Thus, where an acute risk is present and may occur at any time, EPA anticipates that a decision will be needed quicker, and perhaps with less information, than in cases where the risk of harm is less acute or is not likely to occur until some certain future time.

While EPA and other authorities are mindful of the potential adverse economic and other impacts of a §303 order, the nature of this provision is such that where public health is at stake, it may not be appropriate to delay issuance of an order while definitive information is developed on such matters, or to wait until the cause, source, and extent of the risk is fully understood. Rather, it may be appropriate in some instances to use §303 to provide sufficient protection to the public or the environment while more information is developed and a permanent solution arises.

A. Judicial Action

1. Referral of a judicial action to the Department of Justice

Any judicial action under §303 would be brought by the United States Department of Justice (DOJ) and requires referral of the action to DOJ. The form and length of a judicial referral often vary depending upon the need for expeditious intervention by the district court. For example, a "letter referral" that sets forth the critical information in a concise manner may be appropriate in emergency situations. EPA should also seek DOJ involvement during the information gathering and investigative process. DOJ's involvement prior to formal referral should facilitate the use of "letter referral" process or accommodate abbreviated judicial referrals.

Once an action is filed in district court, DOJ will take the lead in litigating the case in accordance with EPA policies and the EPA/DOJ Memorandum of Understanding, and in coordination with appropriate EPA participants.

As previously stated, administrative orders issued pursuant to §303 have a maximum 60- or 74-day duration dependent upon whether EPA is seeking subsequent judicial action. If EPA and DOJ are unable to seek judicial relief upon immediate conclusion of the statutory time frame, EPA should obtain a tolling agreement or other similar written document from the pollution source to toll the 60 day clock. The written agreement should also include a notification provision requiring the source to notify EPA of any operational changes. For example, if a §303 order curtails operations at a manufacturing facility, EPA should obtain a tolling agreement extending the duration of the order and requesting that the pollution source provide notice to EPA if it intends to resume full production.

2. Judicial relief available

Section 303 authorizes the courts to issue injunctions restraining activities that may present an imminent and substantial endangerment or to take any action "as may be necessary." This implies that the judicial relief requested should be limited to that which is necessary to address the endangerment. While exercising its discretion to issue an injunction, a court may order either a specific action or a restraint from acting. In addition, it may use its discretion to order all or part of the relief requested or to order other relief that it deems appropriate. The means by which a court will order specific actions or restraints on action may include temporary restraining orders, preliminary injunctions, and permanent injunctions. A temporary restraining order is an order issued by a judge that prohibits specified activity or otherwise maintains the *status quo* until the court can hold a hearing on the issue. A preliminary injunction is a judicial order requiring a person to take or refrain from a specified action until the court can hold a trial on the issue. A permanent injunction is a final judicial order, which is reached after a trial on the merits, that requires a person to take or refrain from a specified action.

B. Administrative Orders

Section 303 confers upon EPA the authority to issue orders administratively without the need for civil judicial action. These administrative orders may not be subject to pre-enforcement judicial review.[54] An order can include any action as may be necessary to protect public health, welfare, or the environment. For example, an order may require specific tasks such as installing pollution control equipment, reducing production, modifying or shutting down process operations causing the pollution, or closing the facility. When the conditions at the site are not sufficiently defined to allow a concise description of the action required, an order may require the source to immediately abate the emissions and undertake any analysis and follow-up action that may be required to ensure that endangerment will not recur.[55] An order may also require the respondent(s) to meet emissions performance standards or limits, rather than dictating the specific remediation to be performed. Other actions may also be ordered as necessary. Administrative orders issued under §303 are enforceable by the Administrator under the §113 provisions for administrative, civil judicial, and criminal penalties.

1. Record and content of administrative orders

EPA will establish an administrative record during the investigative phase to support the issuance of a §303 order. In exigent circumstances this record need not be extensive, but should be sufficient for a reviewing body to discern the reason for the action taken. Where time is of the essence, it may be appropriate to draft a short memorandum at the time of the action and follow that memorandum with a more detailed statement as time permits. The record should contain all of the evidence EPA relied on in determining whether there is an imminent and substantial endangerment, including (but not limited to) eye witness accounts, medical reports, scientific findings concerning exposure effects, and other evidence as described above.

An Administrative Order under §303 should include the following elements.

- A statement of jurisdiction -- This statement should set forth EPA's authority under §303 to issue the order and cite the delegation of this authority to the Agency official signing the order.

- Findings of fact -- These should include the facts that demonstrate that the legal requirements for issuing a §303 order have been met and that the actions ordered are necessary to protect public health, welfare, or the environment.

- Conclusions of law -- This section will include conclusions that the legal requirements for a §303 order have been met. In orders issued to more than one person, the order may

---

[54] See Clean Air Act Amendments of 1990, Chafee-Baucus Statement of Senate Managers, reprinted in Cong. Rec. 516953, October 27, 1990.

[55] See *Trinity America Corporation, d/b/a Trinity Foam of Carolina, and Trinity Fibers of Carolina, Inc., Order Pursuant to Sections 114 and 303 of the Clean Air Act*, EPA Region IV, October 3, 1997.

include a statement that each respondent is required to carry out each obligation of the order and that failure of one or more respondents to comply does not affect the obligation of the other(s) to perform.

- Order -- The order should identify the actions to be performed and when they are to be completed.

- Enforcement -- The order should identify the potential sanctions for non-compliance. This is not required but may encourage the respondent(s) to comply.

2. Standard and scope of review of administrative orders

As discussed above, EPA believes that administrative orders are not subject to pre-enforcement judicial review. However, if review is granted in the context of an enforcement action, courts will overturn an agency order if it is deemed "arbitrary and capricious." The arbitrary and capricious standard gives administrative agencies broad discretion in deciding how to administer the law.

In addition, courts will generally examine whether proper procedures were followed, and will also consider due process concerns. Due process does not necessarily mandate an evidentiary hearing prior to issuance or enforcement of the order. Rather, the requirement is flexible and requires that respondents have an opportunity to comment on the evidence "at a meaningful time, in a meaningful manner."[56] Although there does not appear to be a clear standard for how much process is enough, EPA should provide the respondent an opportunity to comment on the order, and to confer with the Agency regarding compliance with the order, unless there is reasonable cause for concern that procedural delays could result in harm.

---

[56] *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *United States v. Seymour Recycling Corp.*, 679 F. Supp. 859, 864 (S.D. Ind. 1987) (citation omitted).